

**UNITED STATES COURT OF APPEALS**

**NOV 20 2001**

**TENTH CIRCUIT**

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**PATRICK FISHER**  
Clerk

BRIAN ANDERSON,

Petitioner-Appellant,

v.

JUANITA NOVAK and ATTORNEY  
GENERAL OF THE STATE OF  
COLORADO,

Respondents-Appellees.

No. 01-1173

(D.C. No. 98-N-140)

(D. Colo.)

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**ORDER AND JUDGMENT\***

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Before **SEYMOUR** and **McKAY**, Circuit Judges, and **BRORBY**, Senior Circuit Judge.

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After examining the briefs and the appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G).

The case is therefore ordered submitted without oral argument.

Mr. Anderson appeals the district court's rejection of his § 2254 habeas petition. The district court adopted the magistrate judge's recommendation that

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\*This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Mr. Anderson's petition be rejected as time-barred under AEDPA. Alternatively, the district court ruled that all but one of Mr. Anderson's claims were procedurally defaulted. The district court dismissed Mr. Anderson's remaining claim of constitutional error in his in-court identification on the merits under the totality of the circumstances test.

After a thorough review of the record, we conclude that the district court correctly denied Mr. Anderson's petition. For the same reasons set forth in the magistrate judge's recommendation, we dismiss Mr. Anderson's habeas petition. However, we take no position as to whether Mr. Anderson's claims are time-barred under AEDPA. Mr. Anderson's procedural default of the majority of his claims and his failure to show that the method of his in-court identification was constitutionally deficient under the totality of the circumstances test is sufficient, standing alone, to reject his petition.

We DENY Mr. Anderson's application for a certificate of appealability and DISMISS his appeal. We also DENY his motion to proceed in forma pauperis as moot.

Entered for the Court

Monroe G. McKay  
Circuit Judge